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No. 07-958

FILED

APR 18 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

MELVIN E. HUNTER, et al.,

Petitioners,

v.

JAMES ALLEN HYDRICK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

A. This Court Should Grant Review to Resolve Confusion in the Circuit Courts Regarding the Specificity Required to Plead Civil Rights Violations Against Government Actors 2

B. The Ninth Circuit's Decision Was Incorrect Under Rule 8(a)(2) and This Court's Precedent 6

C. The Ninth Circuit's Decision, if Unreviewed, Will Subject Government Actors to Increased Litigation 11

TABLE OF AUTHORITIES

Page

CASES

Bell Atlantic Corporation v. Twombly, 127 S. Ct. 1955 (2007) 3, 6

DeLeon v. City of Dallas, No. 04-11021, 2005 WL 1621340 (5th Cir. July 7, 2005) 5

Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003) 4

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) 2, 3

Jacobs v. City of Chicago, 215 F.3d 758 (7th Cir. 2000) 2

Jenkins v. Tauanuu, No. CV 07-5115-ODW, 2008 WL 975076 (C.D. Cal. Apr. 7, 2008) 12

Mitchell v. Forsyth, 472 U.S. 511 (1985) 3

Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002) 4, 5, 6

Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) 2, 5

Sumahit v. Parker, No. CIV S-03-2605, 2008 WL 449713 (E.D. Cal. Feb. 15, 2008) 12

Thomas v. Independence Twp., 463 F.3d 285 (3d Cir. 2006) 2

Truvia v. Julien, No. 05-30451, 2006 WL 1675116 (5th Cir. June 12, 2006) 5, 6

Weissman v. Nat'l Ass'n of Sec. Dealers, 500 F.3d 1293 (11th Cir. 2007) 2

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Federal Rule of Civil Procedure 8(a)(2) 1, 6

OTHER AUTHORITIES

Petition for Writ of Certiorari, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008) 3, 4

Petition for Writ of Certiorari, *Hasty v. Iqbal*, No. 07-827 (U.S. Dec. 17, 2007) 3

The Court should grant review to resolve confusion among the circuits regarding the specificity of pleading required to state an individual-capacity civil rights claim against government actors. The circuit courts, in numerous published decisions, have repeatedly noted the difficulty of reconciling this Court's precedents in such cases. Two other petitions for certiorari currently pending before this Court raise issues similar to this one.

The present case involves an especially pernicious style of pleading that demands this Court's intervention. Rather than sue the actual employees who allegedly infringed on their rights (e.g., by conducting searches, failing to clean facilities, etc.), respondents instead sued management-level personnel on the apparent theory that the alleged rights violations somehow must have been carried out pursuant to "policies, practices and customs," the contours of which respondents failed to plead. The idea that someone, merely because of his or her title, must necessarily bear responsibility for plaintiffs' injuries is, if adopted, a license to sue *all* management-level officials in *all* civil rights cases.

While respondents dispute that their pleadings are so conclusory, a review of the operative complaint demonstrates just the opposite. The mantra "policies, practices and customs" (with some insignificant variations) appears no fewer than 30 times in the complaint. The conclusory nature of the allegations sanctioned by the Ninth Circuit here is incompatible with Federal Rule of Civil Procedure 8(a)(2), this

Court's precedents, and numerous published decisions from other circuits.

A. This Court Should Grant Review to Resolve Confusion in the Circuit Courts Regarding the Specificity Required to Plead Civil Rights Violations Against Government Actors.

1. Respondents contend that this Court's review is unnecessary because its decisions have already completely clarified the pleading requirements in individual-capacity civil rights lawsuits. *See* Opp. at 11-12. However, the courts of appeals themselves have repeatedly described the difficulty reconciling this Court's precedents, and particularly the tension between traditional pleading standards and the policy in favor of early resolution of qualified immunity defenses. *See, e.g., Iqbal v. Hasty*, 490 F.3d 143, 153-59 (2d Cir. 2007), *petitions for cert. filed*; *Thomas v. Independence Twp.*, 463 F.3d 285, 299 (3d Cir. 2006) (noting "incompatibility between the concept of notice pleading and the qualified immunity doctrine"); *Schultea v. Wood*, 47 F.3d 1427, 1435 (5th Cir. 1995) (Jones, J., concurring) (suggesting that this Court's precedents "might *require* the imposition of a heightened pleading standard" in individual-capacity civil rights cases); *Jacobs v. City of Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000) ("The Supreme Court has recognized the tension in this area but has declined to address this issue."); *Weissman v. Nat'l Ass'n of Sec. Dealers*, 500 F.3d 1293, 1303-10 (11th Cir. 2007) (Tjoflat, J., dissenting) (citing this Court's precedents

for, *inter alia*, the proposition that pleadings may not rest on "conclusory characterizations" of defendant's conduct).

Most recently, the Second Circuit observed that this Court's decisions are "not readily harmonized." *Iqbal*, 490 at 153. The court also noted that *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), has created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings." 490 F.3d at 155; *see also id.* at 157. Judge Cabranes wrote separately to "underscore[ ] that some of those precedents are less than crystal clear *and fully deserve reconsideration by the Supreme Court at the earliest opportunity*." *Id.* at 178 (Cabranes, J., concurring) (emphasis added).

Unsurprisingly then, two other certiorari petitions are pending before this Court that seek clarification regarding the specificity of pleading required in civil rights claims. Petition for Writ of Certiorari, *Hasty v. Iqbal*, No. 07-827 (U.S. Dec. 17, 2007); Petition for Writ of Certiorari, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008) ("*Ashcroft* Pet."). While these petitions involve claims against federal rather than state officials, this Court's concern that qualified immunity be immunity from litigation, rather than merely to liability, applies equally to both. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The pleadings in the present case are even more conclusory than those considered in *Iqbal*. While plaintiffs in *Iqbal* also sought to impose liability on

higher-level personnel on the basis of a "policy" implemented by others, at least they pled the nature of the policy (detention of suspects determined to be of "high interest" in "highly restrictive conditions" after the September 11, 2001 terrorist attacks), and defendants' respective roles in promulgating that policy. *Ashcroft* Pet. at 3, 12 (defendant "approved" the policy); *id.* at 4 (defendant was the "principal architect" of the relevant policies and practices; defendant was "instrumental in the adoption, promulgation, and implementation" of the policies and practices). By contrast here, while respondents pled specific wrongs and deprivations in some detail, they did not describe either the "policies, practices and customs" that purportedly led to those wrongs, or petitioners' respective roles with respect to the creation or implementation of those "policies, practices and customs," at all.

2. Respondents also misrepresent the uniformity of the circuit courts. For example, they state several times that "every circuit" has rejected a "heightened pleading" standard and now requires traditional notice pleading. *See, e.g.*, Opp. 17, 25. However, both the Fifth Circuit and the Eleventh Circuit have recently applied a "heightened pleading standard" in individual-capacity civil rights suits. *Oliver v. Scott*, 276 F.3d 736, 741, 742 (5th Cir. 2002); *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003). Ultimately even respondents must concede that the Eleventh Circuit continues to characterize its

pleading standard as a "heightened" one. Opp. at 25, 29.

Respondents imply that the Fifth Circuit abandoned its "heightened pleading" standard in 1995, when it decided *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). But *Shultea* expressly declined to do just that. *Id.* at 1430 ("Our statement of the measure, 'heightened pleading,' has not changed, but in application it has moved, linked as it is to the substantive principle."). The Fifth Circuit has continued to apply a "heightened pleading" standard in individual-capacity civil rights lawsuits after *Schultea*. *See, e.g., Oliver*, 276 F.3d at 742; *Truvia v. Julien*, No. 05-30451, 2006 WL 1675116, at *1 (5th Cir. June 12, 2006) ("Appellants must satisfy a heightened pleading standard to state a § 1983 claim against Sins in his individual capacity by alleging 'specific conduct and actions giving rise to constitutional violations'"); *DeLeon v. City of Dallas*, No. 04-11021, 2005 WL 1621340, at *3 (5th Cir. July 7, 2005) ("Distinct from the notice pleading standard embodied in Rule 8, the heightened pleading standard applicable in cases defended on qualified immunity grounds requires a plaintiff to plead 'with factual detail and particularity, not mere conclusory allegations.'").

Perhaps more significantly, the Fifth Circuit expressly held in *Oliver*, in a directly analogous context, that the pleading standard is not satisfied by bare bones allegations of the existence of "policies." 276 F.3d at 742 ("Oliver's complaint fails to identify specific policies or to explain how they permitted or

possibly encouraged cross-sex strip searches and monitoring."). The Ninth Circuit's decision in the present case cannot be reconciled with *Oliver*; had this case been brought in the Fifth Circuit, the motion at issue would have been granted in its entirety. While respondents imply that *Oliver* is no longer good law, the Fifth Circuit continues to rely on it. *Truvia*, 2006 WL 1675116, at *1.

B. The Ninth Circuit's Decision Was Incorrect Under Rule 8(a)(2) and This Court's Precedent.

1. Respondents argue that the Ninth Circuit's decision is consistent with *Twombly*. Opp. at 31 n.3. However, the Ninth Circuit applied a legal standard similar to one that *Twombly* expressly rejected. The Ninth Circuit stated:

> [T]he point of the Rule 12(b)(6) motion is not to evaluate the veracity of the Plaintiffs' allegations, or to speculate as to the Defendants' justifications for their actions. Rather, *unless it is "beyond doubt" that a plaintiff cannot prove facts that would entitle him to relief*, a Rule 12(b)(6) motion must be denied. *Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001).

Pet. App. 10a n.5 (emphasis added). The "beyond doubt" standard articulated here is almost identical to the "beyond doubt" standard expressly repudiated by *Twombly* in favor of a "plausibility" standard. 127 S. Ct. at 1968 (rejecting that a "'complaint should not

be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff *can prove no set of facts* in support of his claim which would entitle him to relief'" (emphasis added)).

2. Respondents dispute petitioners' characterization of their pleadings as conclusory. *See, e.g.*, Opp. at 9-11, 14-16. However, the operative complaint speaks for itself. Pet. App. at 67a-105a. Nonetheless, because respondents discussed this in some detail, petitioners believe that a brief response is necessary.

Respondents discuss three specific allegations that they contend they pleaded in a nonconclusory fashion: (1) that SVPs "'are intentionally exposed'" to unsanitary conditions in various locations in Atascadero, Opp. at 15 (citing the Ninth Circuit's opinion, Pet. App. 36a); (2) "a policy or practice of 'force-medicating the Plaintiffs in non-emergency situations' with psychotropic drugs," Opp. at 15 (quoting the Ninth Circuit's decision, Pet. App. 7a, 27a); and (3) a policy or practice of "'public strip searches, retaliatory searches of their possessions, and arbitrary seizures of their belongings upon arrival at Atascadero,'" Opp. at 15 (quoting the Ninth Circuit's decision, Pet. App. 7a, 27a). While these allegations may be sufficient to state a claim against *someone* or *some entity*, they do not state an individual-capacity civil rights claim against the four petitioners. Instead, the nexus between petitioners and these practices rests on conclusory allegations regarding the assumed existence of unspecified "policies, practices

and customs" in which petitioners purportedly had some undefined role.

For example, with respect to their alleged exposure to unsanitary conditions, respondents plead petitioners' respective roles as follows:

> 58. Defendants' policies, practices, customs, as well as the reckless and callous disregard for the rights of the SVPs, are demonstrated by the punitive, degrading and antitherapeutic conditions described herein.

Pet. App. 91a (Second Amended Complaint ("SAC"), ¶ 58); *see also* Pet. App. 98a (SAC, ¶ 90). Respondents do not describe the form that these policies, practices, customs take; who created them or how they are promulgated; or the individual petitioners' respective roles with respect to them. Furthermore, these allegations conflict with the one documented policy that is pleaded with any detail in the complaint, Administrative Directive No. 602, which expressly recognizes the rights of patients to "dignity, privacy, and humane care" and "the right to be free from harm including . . . abuse or neglect." Pet. App. 83a (SAC, ¶ 33). The analysis with respect to respondents' other allegations is the same.[1]

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[1] With respect to forced medication, ASH Administrative Directive No. 602 expressly recognizes "the right to be free from medication as a form of punishment or for staff convenience." Pet. App. 83a (SAC, ¶ 33). Notwithstanding, paragraph 48 of the complaint conclusorily alleges the existence of presumably contradictory "policies, practices and customs" to which respondents are

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3. Respondents imply that they should be excused from pleading allegations regarding each petitioner's purported role because the problems alleged are so "endemic," "pervasive," "widespread," and "central," that "it is more than 'plausible' to infer that the program's senior administrators were personally involved and/or aware." *See* Opp. at 13, 14. But respondents did not plead that the conditions of which they complain are "endemic," "pervasive," "widespread," and "central"; to the contrary, the complaint is entirely devoid of dates or efforts to quantify the conditions.

More importantly, this argument effectively concedes that respondents named each of petitioners based purely on speculation that they *must* have been involved in the alleged abuses solely because of the titles that they held. Indeed, the *only* allegations in the 103-paragraph complaint that are specific to each petitioner occur in paragraph 14, which alleges the petitioners' individual titles. Pet. App. at 72a-73a. If the only defendant-specific allegation that a plaintiff

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supposedly connected in some unspecified fashion. Pet. App. 87a-88a. With respect to allegations of unreasonable searches and seizures, again, ASH Administrative Directive No. 602 expressly recognizes the rights of patients to "dignity, privacy, and humane care," "to be free from harm including excessive restraints," and the right to "keep and use their own personal possessions." Pet. App. 83a-84a (SAC, ¶¶ 33-34.) Nonetheless, paragraph 75 of the complaint conclusorily alleges the existence of presumably contradictory "policies, practices and customs," again to which petitioners purportedly are connected in some unspecified way. Pet. App. 94a.

can make about a state actor is that he or she was at some point an "Executive Director" of the facility at which alleged abuses have occurred, the complaint has not crossed the line from possible to plausible (all the more so in an *amended* complaint filed after substantial discovery had occurred).

Relatedly, respondents' effort to distinguish several cases cited by petitioners on the ground that they involved discrete conduct rather than "allegations of structural and pervasive misconduct" is not supported by the actual pleadings. *See* Opp. at 30-31 (discussing *Redondo-Borges v. United States Dep't of Housing & Urban Dev't*, 421 F.3d 1 (1st Cir. 2005); *Evancho v. Fisher*, 423 F.3d 347 (3d Cir. 2005); *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993)). But even accepting respondents' characterization of the pleadings, the suggestion that plaintiffs be relieved of pleading the basis for each defendant's culpability in the *most* serious cases (i.e., those that involve "endemic," "pervasive," "widespread," or "central" wrongs) – the very cases carrying the most liability exposure – should be rejected out of hand.

If the problems at Atascadero were in fact pervasive, requiring respondents to plead facts (e.g., specifying which plaintiffs suffered which wrongs; what each defendant purportedly did to contribute to each wrong; and the basis for alleging each defendant's knowledge of each wrong) would hardly represent a significant burden. However, requiring this minimal level of pleading would spare state actors from suit brought on the mere speculation that, because they

have management responsibility, they necessarily must have known about the conditions of which plaintiffs complain, and on that basis be named in their personal capacities in a class action seeking damages.

4. Respondents also contend that they pleaded petitioners' knowledge of the conditions at issue. *See, e.g.*, Opp. at 15 (citing Ninth Circuit's opinion, Pet. App. 16a). Once again, the allegations are entirely conclusory. *See, e.g.*, Pet. App. 70a, 73a, 88a, 90a, 93a (SAC, ¶¶ 5(c), 17, 49, 54, 72). Although petitioners held their various positions at ASH at different times, the complaint makes no effort to differentiate among them. Instead, the court is expected to accept that *all* defendants, who held different positions at different times at ASH, had personal knowledge of (and culpability for) *all* the alleged wrongs, and with no facts pled to specify the basis for that knowledge (e.g., conversations, the filing of complaints, or other communications).

C. The Ninth Circuit's Decision, if Unreviewed, Will Subject Government Actors to Increased Litigation.

Respondents do not dispute that allowing individual-capacity civil rights lawsuits to proceed against state actors based on conclusory allegations of "policies, practices or customs" would expose state actors to increased litigation and liability. Rather, respondents simply argue that this contention "rings

hollow" given petitioners' decision to file their motion at the end of discovery. Opp. at 33-34.

Even were that contention correct (and it is not),[2] at issue here is a published opinion that permits a case to go forward based on a pleading standard that, if unreviewed, will wreak havoc in future cases. *See, e.g.*, *Sumahit v. Parker*, No. CIV S-03-2605, 2008 WL 449713, at *5 (E.D. Cal. Feb. 15, 2008) (citing *Hydrick* decision for proposition that individual-capacity lawsuits may be based on a "policy or custom"). And it is a decision that is openly hostile to early dismissal of individual-capacity lawsuits against state actors. *See, e.g.*, Pet. App. at 9a ("[A] motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding 'far-reaching constitutional questions on a non-existent factual record.'"); *see Jenkins v. Tauanuu*, No. CV 07-5115-ODW, 2008 WL 975076, at *4 (C.D. Cal. Apr. 7, 2008) (citing *Hydrick* for proposition that motions to dismiss on the basis of qualified immunity are "disfavored"). The lack of a record generally available at the motion-to-dismiss stage should militate in favor, not against, requiring adequate pleadings, if state actors are to have any reasonable opportunity to obtain early

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[2] In fact, although merits discovery had concluded when the motion was filed, petitioners were still in the process of producing thousands of documents of supplemental discovery, and expert discovery was just beginning. Petitioners filed their motion after respondents amended their complaint to add Melvin Hunter as a defendant.

dismissal of lawsuits against them. Finally, if the advanced stage of discovery is relevant at all, it cuts against respondents rather than petitioners; that respondents continued to rely on conclusory allegations in an amended complaint submitted almost four years after the lawsuit was initiated confirms that their case relies on speculation rather than facts.

* * *

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Dated: April 18, 2008

Respectfully submitted,

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